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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SHAUN ANTHONY VICTORIA, Defendant and Appellant.	C065482 (Super. Ct. No. 05F07063)

A jury convicted defendant Shaun Anthony Victoria of attempted murder and assault with a deadly weapon, in the course of which he personally used a deadly weapon and inflicted great bodily injury. The trial court thereafter sustained two recidivist allegations. It imposed a state prison term of 25 years to life plus nine years for enhancements, with conduct credits limited to 15 percent of actual presentence custody. (Pen. Code, § 2933.1.)

On appeal, defendant argues the trial court erred in allowing character evidence in the form of the forcible nature of his previous convictions. He also contends he was entitled

to instructions sua sponte on imperfect self-defense, heat of passion, and accident or mistake. Finally, he claims the trial court erred in giving a limiting instruction that precluded the jury's substantive use of some of the victim's extrajudicial statements. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The now deceased victim, Rodney Scaife, was defendant's constant companion, who even travelled with defendant on his long-haul trucking trips. Scaife received treatment at the emergency room for stab wounds to his torso and right arm in August 2005. The wounds were life threatening, and if untreated could have been fatal. He spent four days at the hospital before being released. At the time of his admission, he told a nurse that his roommate attacked him in the shower and stabbed him. He also told this to a residential security guard, who had found him lying outside and called 911. He later died in Arkansas in September 2009, when a car struck him as he was standing outside a vehicle after a crash.

There are several accounts of how the 2005 stabbing came about. We will list them in turn. Additional facts pertinent to the arguments on appeal will be incorporated in the Discussion.

A. Defendant's Sacramento Girlfriend: Two Versions

Testimony

Defendant's Sacramento girlfriend, Megan R. (Megan or the Sacramento girlfriend), and defendant began dating in April 2004. In August 2005, they had an argument that escalated into

physical violence; defendant struck Megan with his fist and a tool before falling asleep on her sofa. Scaife, who had been outside during the fight between defendant and Megan, attempted to comfort Megan in her bedroom. He told her she should break off her relationship with defendant, then tried to kiss her. She rebuffed him and he left the room.

The next morning, Megan told defendant he had to take his belongings and leave her apartment. When she got home that evening after midnight, defendant came up to her as she got out of her car, knelt down, and begged forgiveness. She invited him to come inside and talk for a few minutes.

Scaife entered Megan's apartment about a half-hour into their conversation, and asked if he could shower. When Scaife left to get a bag out of defendant's car, Megan told defendant about Scaife's attempt to kiss her the previous night. Defendant seemed visibly angry; he grabbed his cell phone and his cigarettes and went outside. He brushed past Scaife as Scaife was coming back in.

Scaife came out of the bathroom naked and asked for towels. Megan, unsure of defendant's location, called him and told him what Scaife had done. Almost immediately, defendant came back into the apartment "really angry" and walked toward the kitchen mumbling that he could not believe it. He grabbed a knife from the counter knife block and walked quickly toward the bathroom.

Defendant opened the bathroom door and pulled back the shower curtain. From the sofa, Megan could see defendant make

punching motions at Scaife, and then she saw blood. She never saw Scaife holding the knife. Scaife grabbed for his clothes and fled the apartment, defendant following him with knife in hand.

Megan was standing there still in shock when defendant returned after a few minutes. He dropped a mesh shirt into the sink, and told Megan to get her things because they were leaving. As they drove off in her car, she could see the apartment complex's security guard kneeling over Scaife, who was lying on the walkway. They headed to her grandfather's vacant home to spend the night.

While there, defendant called two or three women. Megan heard him tell one of them that he had stabbed Scaife because he had tried to rape Megan. Defendant also told Megan that they would need to agree on an account of what happened. After formulating several different versions, he eventually instructed Megan to tell the police that Scaife had tried to rape her; that when defendant confronted him, Scaife had pulled a knife on him (that he already had with him in the bathroom); and that Scaife was stabbed as defendant struggled for control of the knife.

They went to a hospital where Megan's mother worked (after telling her that they were on their way). Defendant had wanted to talk to Megan's mother before going to the police, because he had a good relationship with her. The mother arrived at the hospital already in the company of the police, who then arrested defendant.

Extrajudicial Statements

In her statement to the police, Megan initially adhered to defendant's version of the incident. She claimed Scaife had tried to rape her two nights earlier. He had taken a knife into the bathroom on the night of the stabbing because he was afraid she would tell defendant what had happened. When defendant confronted Scaife after Megan had told him about the attempted rape, the stabbing occurred in the course of attempting to disarm Scaife, who fell onto the knife in the struggle.

As the detective continued to question Megan aggressively, she became afraid that he was not believing this story, so she told the truth as reflected in her testimony. She nonetheless repeated defendant's version to the attorney she had hired to represent him initially, because she was afraid that defendant would be released from jail before trial.[1]

B. The Redding Girlfriend: More Fuel for the Fire

Defendant had started dating a girlfriend in Redding, Amy W. (Amy or the Redding girlfriend), in October 2003; he moved into her Redding home in September 2004. By February 2005, defendant started bringing Scaife home fairly often. Amy did not like this and thought Scaife was "creepy and scary" because he had often grabbed at her, and once pushed her onto a bed and invited her to have sex as he lay atop her. She had not

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[1] Defendant's attorney testified that in her interview with Megan, she had attested to the truth of the initial version in the police interview, and had changed the story only under pressure from the detective.

told defendant about these incidents. But this was one of the reasons she asked defendant to move out of her Redding home in the spring of 2005. Scaife had started telling Amy unsavory things about defendant behind his back, including that defendant had started dating the Sacramento girlfriend and would be moving in with her (contrary to what defendant had said to Amy).

On the night of the stabbing in August 2005, defendant called Amy after learning about Scaife's attempt to kiss the Sacramento girlfriend. Amy then told defendant about Scaife's backstabbing remarks. Defendant told her he was going to go inside and take care of matters, but he did not sound upset.

C. Scaife's Extrajudicial Versions

Corroborating Defendant

An inmate testified he had known Scaife for two years preceding the stabbing. He encountered Scaife when both were in a holding cell at the jail, in what he thought (mistakenly) was the spring of 2005. Scaife asked him to deliver a note to defendant, who was awaiting trial on the stabbing. Scaife wanted defendant to know that he would not be testifying against him. Scaife explained to the inmate that he had exposed his genitals to Megan (defendant's Sacramento girlfriend) in the bedroom while holding a knife with the intent of having sex. When she rebuffed him and said defendant would be angry, he took the knife with him to the bathroom. He scuffled with defendant in the bathroom while trying to stab him, and fell onto the knife after dropping it.

Defendant's initial attorney had also interviewed Scaife in the county jail in August 2005. Scaife admitted taking a knife into the bathroom to protect himself because he knew that defendant would be upset, and said that he had been stabbed in the struggle for the knife.[2]

Noncorroborating

The prosecutor introduced a recording and transcript of a pretrial phone call between the jailed defendant and a female friend. These involved messages left on defendant's voice mail, which the female friend played for him during the phone call via the speaker on her cell phone. Several of these messages were from Scaife. He denied threatening any of defendant's female acquaintances, as they had apparently reported. He claimed credit for having saved defendant's life when he woke him up while driving the truck, which defendant had failed to take into consideration in their confrontation. (In response to this remark, defendant commented aloud, "Well, save me from going to jail now.") Scaife complained that no one else had ever put him in the hospital, and that defendant had gone too far. Scaife asserted that he was not going to press charges, and asked that in return defendant help him get back to Tennessee when he got

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[2] Both of these statements (along with the next two recorded phone calls) were the subject of a limiting instruction, restricting their substantive use to the corroboration of Scaife's statements to the nurse and the security guard that we mentioned above (except to the extent they resulted in adoptive admissions on defendant's part). We will address this instruction more fully in the Discussion.

out of the hospital (for which reason he wanted defendant to retrieve his belongings). Scaife denied being naked in front of Megan and questioned why someone (presumably the Redding girlfriend) had delayed telling defendant something (presumably about Scaife's badmouthing) until the night of the incident. Scaife promised that he had not talked to anyone about the incident and would not "do anything," and urged defendant to get himself out of trouble.

The prosecutor also introduced a recording and transcript of a phone call the next day from defendant to Scaife at the hospital, via a three-way call with the female friend. Scaife stated that he had declined defendant's offer of help at the scene of the stabbing because defendant was still holding the knife as he followed Scaife. Defendant reminded him that their conversation could be recorded. Scaife noted that he told the police he had not decided whether he would testify against defendant, and asserted that the police could not pursue defendant without his cooperation. Defendant said he had given a version of the stabbing to the police in which they had been wrestling over the knife when Scaife fell on it. Scaife asked, "And they bought that?" Defendant replied that they had not; "You're going [to] have to corroborate it." Scaife agreed he could do that. Defendant promised that he would then get Scaife back to Tennessee as Scaife had requested in the voice mail messages. Scaife expressed concern about Megan having claimed that he had sexually assaulted her. Defendant assured him that

it was not something about which to be concerned. When Scaife asked why the stabbing happened if defendant considered him a brother, defendant reminded him not to discuss the matter on the phone and promised to talk to him about it when he was released. Scaife was shocked to learn that he had told the police before passing out that defendant had stabbed him. Scaife noted that he had spoken already to the female friend who set up the call and said, "I did tell her what maybe if you could maybe say it go down like this." Scaife also reiterated his intention to disappear before any trial, saying "They can't do nothing to you without me being there."

D. Defendant's Versions

Testimony

Defendant testified Scaife had a habit of making passes at defendant's "lady friends," and on the night of the stabbing defendant had learned this was true with Megan as well. This did not greatly upset him because he had only a casual relationship with this girlfriend (his relationship with the Redding girlfriend was still ongoing) and he was "immune" by now to Scaife's behavior in this regard. His conversation with the Redding girlfriend did not have any effect on him, because he already knew about some of Scaife's badmouthing.

After defendant went calmly into the bathroom to ask Scaife about his behavior, Scaife brandished the knife at him as defendant turned to leave. They struggled for possession of the weapon (defendant punching Scaife as well), and Scaife fell onto it once (incurring multiple stab wounds). Defendant ordered

Scaife to leave. He chased Scaife, who carried the knife with him, out of the apartment. Scaife dropped the knife on the pathway along with a mesh shirt. Defendant picked these items up and put them in the kitchen sink when he returned to the apartment.

Extrajudicial Statements

In addition to defendant's statements in the recorded phone conversation with Scaife, he had made statements in his conversation from jail with the female friend on the day before. He had asked her to go to the hospital and talk with Scaife. He claimed Scaife's refusal to talk was the reason defendant was still in jail, because Scaife had initially identified defendant as the stabber, so Scaife now needed to talk to the investigating detective and exculpate defendant with the version that they had wrestled over a knife and Scaife fell on it. In return, defendant would make sure Scaife got to Tennessee. Defendant also suggested the female friend mention that his women acquaintances would file complaints about Scaife threatening them if he did not do this.

The Sacramento girlfriend continued to talk with defendant while he was in jail awaiting trial. During one of her visits, he held up a note that asked her to claim *she* had stabbed Scaife. The jailers seized the note, which was an exhibit at trial along with a note Megan wrote in response. Defendant acknowledged the note he had shown Megan during her jailhouse

visit with him. He said that it was merely a sarcastic response to her false statements to the police.

DISCUSSION

I. Character Evidence

In July 1991, defendant was convicted of rape and forcible oral copulation in concert. He and two codefendants had sexually assaulted a friend's girlfriend in her home, and robbed her afterward.

The prosecutor moved to admit the evidence of these two convictions for impeachment purposes in the event defendant testified. On learning defendant intended to testify, the court granted the motion but limited the evidence to the bare fact of two prior felony convictions. The court cautioned defense counsel, however, that "if any doors are opened to violence, then [the nature of those offenses] may become relevant."

During redirect examination, defendant asserted that he had a problem with Scaife only when the latter had been drinking (which he believed Scaife had been doing on the night of the stabbing). There would be a personality change, which defendant described as "evil, screaming . . . , his judgment just out of the window completely . . . ." He also described a previous scuffle between them, when defendant was driving the inebriated Scaife home and he grabbed at the steering wheel. This led to a pushing and yelling match.

The prosecutor then argued this testimony regarding Scaife's character and defendant's portrayal of him as the

aggressor made defendant's aggressive character relevant and moved to admit the prior convictions as evidence of defendant's character for violence. Although defense counsel argued the priors were too remote, the prosecutor pointed out that defendant had been in prison for most of the intervening period. The trial court granted the motion; however, it limited the additional evidence to the fact that the prior convictions involved force. In response to the prosecutor's question, defendant acknowledged the forcible nature of the priors.

Defendant agrees that a defendant who introduces evidence of a victim's character for violence (in support of a theory of self-defense from a victim's act of aggression) forfeits the statutory protection against introduction of character evidence to establish the defendant's propensity for violence. (Evid. Code, §§ 1101, subd. (a), 1103, subd. (b); see *People v. Walton* (1996) 42 Cal.App.4th 1004, 1014.) Defendant argues, however, that his testimony did not establish Scaife had a *violent* character when drunk. Rather, he had testified only that Scaife was a "belligerent" drunk. He asserts the trial court consequently erred at the foundational level in allowing the introduction of the forcible nature of his prior convictions into evidence, abusing its discretion as a matter of law.

Defendant cites *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172 (*Blanco*). The case is not instructive, however. It holds only that it is constitutionally permissible for the statute to allow "certain types of character evidence in

rebuttal, only after [a] defendant first raises the issue by presenting evidence of the victim's character in order to prove [a] . . . reasonable response to alleged provocation or attack." (*Blanco*, at p. 1175.) The case does not, however, at any point purport to define the *type* of character evidence of a victim that comes within the statute and triggers the prosecution's entitlement to introduce rebuttal evidence, and thus its mere employment of the term "violence" in describing the narrow reach of the statute (*id.* at p. 1172) cannot be construed as a holding that limits the statute only to that type of character evidence.

Defendant is engaging in hairsplitting. He has not demonstrated that "evidence [of a] victim['s] . . . character for violence or a trait of character tending to show violence" (Evid. Code, § 1103, subd. (b)) connotes any peculiar meaning for "violence" as a term of art. The concern of the statute is evidence of character to support a defendant's claim that the victim was *an aggressor* to whom the defendant responded with acts of self-defense. (E.g., *People v. Moreno* (2011) 192 Cal.App.4th 692, 702 [defendant entitled to discover evidence indicating victim had "propensity for violence *or aggressive behavior*" (italics added)]; *Engstrom v. Superior Court* (1971) 20 Cal.App.3d 240, 245 [same; "specific *acts of aggression*" (italics added)]; *Blanco*, *supra*, 10 Cal.App.4th at pp. 1173-1175 [discussing derivation of rule behind Evid. Code, § 1103, subd. (b)]; see *People v. Thomas* (1969) 269 Cal.App.2d 327, 329 [in proof of self-defense, would be entitled to

introduce evidence of "specific acts *of prior belligerence*" (italics added)]; 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Character, Habit, and Custom, § 33.5, p. 1195 [proper to submit evidence of fights in which victim was aggressor to prove victim was aggressor in fight with defendant].)[3] Defendant's evidence in the present case was of this tenor: The victim was a belligerent drunk; defendant asserted his belief the victim had been drinking; and, therefore, the victim was the one to wield the knife, not defendant. That satisfied the necessary foundation for admission of the forcible nature of defendant's prior convictions. As a result, the trial court did not err in admitting the nature of the prior convictions.

II. Instructional Challenges

A. Imperfect Self-defense

Defendant asserts the trial court violated its duty to instruct sua sponte on attempted voluntary manslaughter as a lesser included offense, because there was substantial evidence

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[3] We note the recent case of *People v. Fuiava* (2012) 53 Cal.4th 622, 699 observed in passing (in the course of upholding the constitutionality of the statute) that "The federal rule (and those of 12 other jurisdictions) actually would appear to be broader than [Evidence Code] section 1103[, subdivision] (b) in the sense that *its* scope is *not limited to evidence of violence*." (Italics added.) While "we accord substantial weight to Supreme Court dicta which is neither inadvertent [n]or ill-considered" (*Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 428, fn. 4, citing *Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971), this aside on the scope of the statute does not appear to be the advertent product of plenary consideration. Accordingly, we decline to give it persuasive weight.

that he actually but *unreasonably* believed in the need for an attempt to resort to deadly force in his own defense. (*People v. Breverman* (1998) 19 Cal.4th 142, 159 (*Breverman*); *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 833-834 (*Szadziewicz*).) Defendant suggests that whenever, as here, a jury is instructed on reasonable self-defense, a court must also instruct the jury on unreasonable self-defense, relying on the concurring opinions in *People v. Ceja* (1994) 26 Cal.App.4th 78, 88-89 (conc. opn. of Johnson, J.) and *People v. De Leon* (1992) 10 Cal.App.4th 815, 825 (conc. opn. of Johnson, J.) (but see *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1273 [distinguishing the cases and rejecting this premise], cited with approval in *Szadziewicz*, *supra*, 161 Cal.App.4th at p. 834).

As our summary of the evidence demonstrates, whatever the version of events in the evidence (other than the testimony of the Sacramento girlfriend, that defendant initiated the attack on Scaife with the knife), they did not include defendant's *intentional use* of deadly force in response to Scaife's attack on him. In the trial court, defense counsel responded to the prosecutor's claim that self-defense was not an issue with an assertion "That's not true," but did not explain which facts gave rise to a claim of self-defense rather than accident (other than point to evidence that defendant had a reasonable fear of great bodily injury). Defendant takes the same tack on appeal, asserting in passing at one point that "a reasonable juror could conclude[] that the person being attacked reasonably believed

that *it was necessary to stab the aggressor* in order to stave off the attack" (italics added) without explaining what evidence would support that emphasized fact. When challenged on this point, he simply asserts "a defendant should not be precluded from pursuing alternate defenses," without acknowledging that he *never* in fact at any point asserted that he had stabbed Scaife in self-defense (except in one of the phone calls while he and the Sacramento girlfriend were in her grandfather's home).

Defendant's own authority defeats his argument. "Under this victim-inflicted-his-own-injuries theory, [defendant] arguably was not entitled even to the actual self-defense instruction that the court gave. That windfall did not entitle him to an additional instruction on imperfect self-defense." (*Szadziewicz*, *supra*, 161 Cal.App.4th at p. 834.) Similarly, the various versions of events in the bathroom in the present case do not include defendant deliberately stabbing Scaife out of fear that Scaife was about to inflict deadly force on defendant. The evidence supported either a prosecution theory in which defendant was the aggressor, or a defense theory of accident; reasonable self-defense does not properly play any role on this evidence. Therefore, even if the unwarranted self-defense instruction could have been justified based on an intentional stabbing inferred from the mere facts of defendant's presence and Scaife's injuries, the trial court did not have any duty to instruct on *imperfect* self-defense sua sponte. "Where, as here, the defendant's version of events, if believed,

establish[es] actual self-defense, while the prosecution's version, if believed, negates both actual and imperfect self-defense, the court is not required to give the instruction [sua sponte]." (*Szadziewicz*, at p. 834.)

B. Heat of Passion

Defendant similarly asserts the trial court erred in failing to instruct sua sponte on attempted voluntary manslaughter because there is substantial evidence in the account of the Sacramento girlfriend that defendant acted in anger as a result of the behavior of Scaife—and perhaps as a result of the phone call with the Redding girlfriend immediately before the stabbing regarding Scaife's badmouthing—*regardless* of the fact that he and his Redding girlfriend both abjured any enmity on defendant's part toward Scaife in their testimony. (*Breverman*, *supra*, 19 Cal.4th at pp. 159-160; *People v. Barton* (1995) 12 Cal.4th 186, 195-196.)

These cases—*Breverman* and *Barton*—refute the Attorney General's attempt to rely on the latter conflicting evidence (the testimony that Scaife's conduct had not angered defendant) as a basis for negating the court's duty to instruct on this theory. However, we agree with the Attorney General's argument that the evidence did not demonstrate a *reasonable* provocation allowing defendant to claim that he acted in a heat of passion.

In order to be entitled to an instruction on sudden quarrel or heat of passion, there must be evidence that a defendant's reason was clouded "as the result of a strong passion," the

cause of which was provocation sufficient to arouse an intense emotion *other than revenge* in a *reasonable* person that overcomes the ability to act on the basis of reason and due deliberation. (*Breverman*, *supra*, 19 Cal.4th at p. 163; *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253; *People v. Lee* (1999) 20 Cal.4th 47, 59-60; *People v. Valentine* (1946) 28 Cal.2d 121, 139.) Though defendant repeatedly employs the loaded term of "sexual advances" to Scaife's conduct, a rebuffed kiss—even combined with a naked promenade—is hardly reasonable warrant for a blind homicidal rage, particularly where defendant had testified this was recurrent behavior on the part of Scaife.

In any event, we must reverse the conviction only if it is reasonably probable that a properly instructed jury would have reached a more favorable outcome for a defendant. (*Breverman*, *supra*, 19 Cal.4th at p. 178.) "In making that evaluation, an appellate court may consider . . . whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id.* at p. 177.) Even if the evidence of the basis for defendant's anger was sufficient to warrant an instruction, we do not believe that it would persuade reasonable jurors to find cause for defendant to act blindly in a heat of passion. We thus reject defendant's argument on both bases.

C. Accident

Defendant's major claim at trial was the accidental nature of the infliction of the knife wounds. Defendant contends the trial court accordingly violated its duty to instruct *sua sponte* on the "defense" of accident.

Several days before defendant filed his opening brief, *People v. Anderson* (2011) 51 Cal.4th 989 held that "accident" is only a variation on a defense theory that a defendant lacked intent, and thus constitutes a "pinpoint" instruction on which a court has a duty to instruct *only on request*. (*Id.* at pp. 996-997.) Defendant acknowledges in his reply brief that we are bound to reject his argument as a matter of state law. He therefore simply asks to preserve the issue for possible federal review.

D. Limiting Instruction

With the assent of defense counsel (who admitted he could not draft a superior version), the trial court instructed the jury on use of Scaife's various extrajudicial statements as follows: "[The victim] did not testify in this trial, but you heard testimony as to statements he made to [the security guard] and [the nurse] as well as statements that were made by [the victim] on a 911 call recording [*sic*; these appear to be the *security guard* repeating his statements, not the victim himself]. You may use those statements as proof that the information contained in them is true. [¶] You have also heard evidence that [the victim] made other statements to [the inmate], [the initial defense attorney,] and to [defendant] on

the recorded jail phone calls. If you conclude that [the victim] made those [latter] statements, then you may consider them only in a limited way. You may use them only in deciding whether to believe the [former] statements . . . . You may not use those [latter] statements . . . as [substantive] evidence . . . [or] for any other reason, unless the following exception applies . . . [:] [¶] . . . [Y]ou [may] consider the statements made by [the victim] to [defendant] on the jail phone call recordings as [substantive] evidence . . . if you believe [the victim's] statements resulted in an adoptive admission by [defendant]," then referencing a separate instruction on adoptive admissions.

Defendant concedes the principle underlying the instruction is correct. He contends, however, that Scaife's statements to the inmate should *not* have been limited to corroborative use because they were statements against penal interest (Evid. Code, § 1230) and therefore admissible substantive evidence.

We will not break down the various components of the hearsay remarks to which the inmate testified and determine which were and were not statements against penal interest.[4] The other recordings made clear that by the time Scaife encountered the inmate, Scaife had already discussed with defendant his

[4] The inmate testified Scaife admitted he had exposed himself to Megan, had taken the knife into the bathroom out of fear of defendant's reaction if she told him, and had fallen on the knife after trying to stab defendant. (See pp. 6-7, *ante*.)

intent and motive to fabricate an exculpatory account of the stabbing. This vitiates *any* aura of trustworthiness, which is necessary for their admission. (*People v. Duarte* (2000) 24 Cal.4th 603, 614-615, 617-618.) We are also convinced beyond a reasonable doubt that the admission as substantive evidence of yet another version of the circumstances of the stabbing would not have changed the outcome of the trial.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

DUARTE, J.